No. 92-725

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ,
Warden, Ely State Prison,

Petitioner,

—v.—

RICHARD ALLAN MORAN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NEVADA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a trial court is constitutionally required to ascertain specifically a defendant's competency to waive counsel and to plead guilty, notwithstanding the court's prior determination of the defendant's competency to stand trial with the assistance of counsel.

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases addressing the relationship between mental competency and the criminal justice system. The ACLU of Nevada is one of its statewide affiliates.

STATEMENT OF THE CASE

Respondent Richard Moran, a chronic abuser of cocaine and other drugs and a past abuser of alcohol, was charged in a Nevada state court in 1984 with three counts of capital murder. Moran was accused of robbing and killing two strangers in a bar and, several days later, killing his former wife before shooting himself in the abdomen in an apparent suicide attempt. Initially, he pled not guilty to all charges.

In September 1984, the court ordered a psychiatric evaluation of Moran to determine whether he was competent to stand trial. The two psychiatrists who examined respondent framed their evaluations in terms geared to the acknowledged standard for competency to stand trial. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 172 (1975).[2] Dr. Jurasky filed his report with the court on September 19, 1984, and found Moran to be "in full control of his faculties insofar as his abilities to aid counsel,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Joint Appendix ("J.A.") 8 (Dr. Jurasky), 17 (Dr. O'Gorman).

assist in his own defense, recall evidence and to give testimony if called upon to do so. The only difficulty would be his difficulty in recalling relevant material while he was under the influence of either alcohol and/or cocaine."[3] Dr. O'Gorman, who examined Moran on September 12, did not file his report with the court until at least November 28, 1984.[4] He concluded that Moran was "knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, *if he so desires*. He is fully cognizant of the penalties if convicted."[5] However, Dr. O'Gorman also noted that Moran "does not recall, specifically, shooting two people in the bar, but he is fully aware of the circumstances, which he

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[3] J.A.8. In fact, earlier in his report Dr. Jurasky noted: "As to the murders themselves, the defendant appears to have little logical or consistent recall. He states, 'I have visions of myself pointing the gun at the victims, but I can't see them. I can see my wife's dead body, but I can't see myself.' Other than that, he has spotty recollection of events after the police picked him up . . . . He was willing to talk to the best of his ability about the homicides in the bar, but all he could state was 'I don't even know what those poor two people in the bar look like. I can only see myself holding the gun," J.A.5-6. Dr. Jurasky concluded that Moran's "memory at the present time seems to be grossly intact for recent and remote events except for when under the heavy influence of alcohol and cocaine." *Id.* at 7. Moran told Dr. Jurasky that "he had been using cocaine very heavily for many months and two weeks prior to these incidences [sic] had been free-basing", *id.* at 4-5.

[4] That is the date on the report. J.A.10. The record does not establish when the O'Gorman report was actually received in the trial court, if it ever was; the trial judge relied upon the Public Defender's characterization of O'Gorman's findings during the plea hearing.

[5] J.A.17 (emphasis added). Both evaluating psychiatrists indicated that respondent might not be inclined to defend himself in the imminent judicial proceedings. Dr. O'Gorman observed that respondent had "a desire to accept capital punishment." J.A.16. Dr. Jurasky noted that "this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense but I do not feel that it is necessarily a major consideration." J.A.8.

claimed he learned later."[6]

Both examining psychiatrists observed that Moran was a heavy user of cocaine and that, in the period immediately prior to the murders, he had "used as much as he could get his hands on, [and] used up all his money, spending it on cocaine."[7] He told Dr. O'Gorman that he "ha[d] a severe need, to continue to use it."[8] He told Dr. Jurasky, "I just had to get more and more of it."[9] Summarizing his findings, Dr. O'Gorman wrote:

> It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy. I feel this is a tragic case that involved the death of three people and the ruination of a fourth and presents a severe indictment to anyone who would argue about the deadly and addictive qualities of cocaine abuse.[10]

In November, Moran, who was taking four different prescription drugs to control cocaine seizures,[11] appeared in court to ask that he be permitted to discharge his public defenders and to change his previously entered

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[6] J.A.10.

[7] J.A.12 (O'Gorman Report); *see also id.* at 4-5 (Jurasky Report).

[8] J.A.12.

[9] J.A.5.

[10] J.A.9.

[11] Moran had been prescribed Inderal, a beta-blocker anti-arrhythmic that causes mental depression, lightheadedness, hallucinations, disorientation, and short-term memory loss; Dilantin, an anti-seizure medication that causes confusion; Vistaril, a depressant that causes drowsiness, tremors and convulsions; as well as phenobarbitol. J.A.92-95, 97-98.

pleas to guilty. He told the judge that he wanted to waive his right to counsel in order to ensure that no witnesses or mitigating evidence would be presented on his behalf in the sentencing phase of the proceeding.[12]

The trial judge questioned Moran at length, securing monosyllabic affirmative answers to a sequence of questions about whether he understood the elements of the offenses to which he sought to plead guilty, and the factors affecting the potential penalties, including aggravating and mitigating circumstances.[13] After a string of "uh-huh," "yeah," "yeah, I do," "yes" and "right" responses, with which Moran purported to agree that he knew the import of waiving his constitutional rights, understood the charges against him and was in fact guilty of those charges, this exchange ensued:

THE COURT: Are you pleading guilty because in truth and in fact you are guilty?

DEFENDANT: Yes.

THE COURT: In Case No. C67482 -- you have the Information in front of you?

DEFENDANT: Yes, sir, uh-huh.

THE COURT: On the 11th day of August, 1984, you were charged that within the County of Clark in the State of Nevada that you did then and there, without authority of law and with malice aforethought willfully and feloniously kill Linda K. Vanderwoort [sic], a human being, by shooting at and into the body of said Linda K. Vandervoort with a deadly weapon: To wit, a firearm.

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[12] J.A.32.

[13] J.A.23-57.

Do you understand all of the allegations in that Information?

DEFENDANT: Yes.

THE COURT: Did you do those things?

DEFENDANT: Yes.

THE COURT: Did you do so deliberately, with premeditation and malice and aforethought --

DEFENDANT: *Not really.*

THE COURT: -- as I've explained to you?

DEFENDANT: *No, I didn't do it -- I mean, I wasn't looking to kill her, but she ended up dead.*

THE COURT: Well, you're charged that you did, with malice aforethought, shoot at and into the body of Linda K. Vandervoort with a deadly weapon, a firearm. Did you do that?

DEFENDANT: Yes.

THE COURT: And did you do so deliberately and with premeditation?

DEFENDANT: *No.*

THE COURT: Did you think about it before you did it?

DEFENDANT: *Not really.*

THE COURT: Did you do it deliberately?

DEFENDANT: *I don't know. I mean, I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it; you know what I mean?*

THE COURT: Well, I've previously explained to you

what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action. Did you do that?

DEFENDANT: Yes.

THE COURT: And the word premeditated means considered beforehand. Did you do that?

DEFENDANT: Yes.

THE COURT: And you remember the definition I gave you regarding malice aforethought?

DEFENDANT: Uh-huh.

THE COURT: A malice can be either expressed or implied; that express malice is the deliberate intention to unlawfully take away the life of a fellow creature. Did you do that?

DEFENDANT: Yes.[14]

Following this exchange, Moran again subsided into a series of monosyllables affirming the statements of the trial judge as he was led through a substantially similar colloquy with respect to the murders in the bar -- the offenses for which Moran is currently under sentence of death.[15] Though the court asked Moran whether he was presently taking any medication and, though he answered

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[14] J.A.57-60 (emphasis added throughout).

[15] On automatic appeal after Moran was sentenced to death on all three murder counts, the Nevada Supreme Court affirmed the sentence of death with respect to the bar killings, but overturned the finding of aggravating circumstances on the other count and remanded for resentencing to the trial court. Appendix to Petition for *Certiorari* ("Pet.App.") C1-C16.

that he was, the court explored no further to determine the type and quantity of drugs involved, let alone their possible psychological or emotional effects.[16]

Moran's waiver of counsel and guilty pleas were accepted by the trial court at the November hearing without any new evaluation of Moran's mental competency.[17] Instead, Moran was found competent to waive counsel and plead guilty based entirely on the court's familiarity with Dr. Jurasky's report and on a brief and inaccurate presentation by the public defender about the expected content of Dr. O'Gorman's report, which apparently had not yet been filed.[18] Both doctors had evaluated Moran's competency to "assist his attorney, in his own defense";[19] yet the court rested on those evaluations to find him competent to waive his constitutional right to the assistance of an attorney.[20] The trial judge did advise Moran that he was "unwise" to proceed without counsel,[21] but

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[16] THE COURT: Are you presently under the influence of any drug or alcohol?

DEFENDANT: Just what they give me in, you know, medications.

J.A.33.

[17] J.A.64 ("The Court finds that the defendant's plea of guilty to the charge in Case No. C67482, and the defendant's pleas of guilty to the charges in five counts in Case No. C67483 to be freely and voluntarily given; further finds that the defendant understands the nature of the offenses and the consequences of his pleas and therefore accepts the pleas of guilty").

[18] J.A.20-21. Drawing on a conversation with Dr. O'Gorman, the public defender stated that, in the doctor's view, Moran "could distinguish between right and wrong and also understood the nature of his acts" at the time of the alleged murders. These conclusions are nowhere in evidence in Dr. O'Gorman's eventual report. *Id.*

[19] J.A.8, 17.

[20] J.A.21.

[21] J.A.23.

whether Moran possessed the competency to appreciate his unwise choice was never the subject of inquiry.

Moran appeared without counsel at his sentencing hearing in late January 1985. He conducted no defense, presented no witnesses, and offered no mitigating evidence on his behalf. On each of the three counts, the three-judge sentencing panel found aggravating circumstances, and sentenced Moran to death. The Nevada Supreme Court ultimately reversed the finding of aggravating circumstances with respect to the killing of Moran's former wife, and remanded for a new sentencing hearing on that count, at which Moran received a life sentence. The other two death sentences were affirmed.[22]

In mid-1987, Moran sought to overturn the convictions, in state court, on the grounds that he had been incompetent to proceed without counsel and to plead guilty. After an evidentiary hearing in April 1988, the Nevada appellate court found that Moran had been competent when he discharged his attorneys and submitted his guilty pleas.[23] The Nevada Supreme Court affirmed.[24]

Moran then petitioned the federal district court for a writ of habeas corpus, which was denied. The Ninth Circuit reversed. The circuit court held that the trial court failed to initiate a new competency inquiry when Moran sought to waive counsel, to plead guilty and to ensure that no defense would be presented on his behalf. Further, the court below decided that the subsequent state appellate court evidentiary hearing on the question of competency had failed to cure the initial defect, because the appellate hearing relied on psychiatric evaluations of Moran's competency to stand trial which were not and

[22] Pet.App. C.

[23] Pet.App. D.

[24] Pet.App. E.

could not have been directed at his later competency to discharge counsel and waive a defense entirely.

SUMMARY OF ARGUMENT

Petitioner does not and cannot dispute certain basic legal principles that form the necessary backdrop for this case. First, an incompetent person can neither be tried nor convicted without violating due process, *Dusky v. United States*, 362 U.S. 402 (1960)(*per curiam*). Second, any waiver of fundamental constitutional rights by a criminal defendant, including those waived by proceeding *pro se* and pleading guilty, is invalid unless it is knowing and intelligent, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Third, an incompetent defendant cannot validly waive his constitutional rights under the *Zerbst* standard, *see Chapman v. United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977).

The disagreement arises in applying these legal principles to the facts of this case. On that question, we disagree with petitioner's automatic assumption that a defendant who is competent to stand trial with the assistance of counsel is, *ipso facto*, equally competent to plead guilty without counsel. Such a notion is at odds both with this Court's precedents, *Massey v. Moore*, 348 U.S. 105 (1954); *Dusky*, 362 U.S. 402; *Westbrook v. Arizona*, 384 U.S. 150 (1966)(*per curiam*), and with clinical recognition of the principle of contextual competency.

Accordingly, a trial court is under a continuing duty to determine a defendant's competency whenever intervening circumstances or new evidence warrant. *Drope v. Missouri*, 420 U.S. 162. This duty is a fundamental tenet of constitutional due process. Here, that duty should have triggered a renewed and focused inquiry into Moran's competency when he sought to discharge his lawyers and reverse his previously entered not guilty pleas to capital murder. Instead, the court relied on

prior psychiatric evaluations dealing with Moran's ability to assist counsel, although those evaluations did not address the very different question of Moran's competency -- emotional, psychological, and intellectual -- to make life or death judgments in the absence of counsel.

Properly framed, the issue in this case is not whether due process requires a *higher* standard of competency to waive certain rights than to stand trial with counsel's assistance. Rather, due process requires that courts *specifically* determine competency in both contexts. *Massey v. Moore*, 348 U.S. 105; *Westbrook v. Arizona*, 384 U.S. 150; *Dusky v. United States*, 362 U.S. 402. Because that specific determination was not made by the Nevada courts in this case, the decision below should be affirmed.

ARGUMENT

I. A DEFENDANT'S DECISION TO DISCHARGE COUNSEL AND PLEAD GUILTY IN A CAPITAL CASE CAN ONLY BE KNOWING AND INTELLIGENT FOR DUE PROCESS PURPOSES IF THE DEFENDANT POSSESSES THE REQUISITE MENTAL COMPETENCY

When Moran appeared at his plea hearing in November 1984, he expressed a desire to waive a number of federal constitutional rights. Whether the state court properly accepted Moran's waiver as valid "is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243 (1968), *citing Douglas v. Alabama*, 380 U.S. 415, 422 (1965). The task of the federal courts on collateral review in this case is ascertain whether the trial court adhered to those federal standards in accepting Moran's *pro se* guilty plea.

Under this Court's well-settled rules, the validity of any constitutional waiver ultimately turns on a clear showing that the defendant has made "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. at 464; *see also Carnley v. Cochran*, 369 U.S. 506 (1962)(both right to counsel cases). Moreover, in enforcing this standard, the trial court may not accept any waiver of constitutional rights that is not "intelligent and competent." *Zerbst*, 304 U.S. at 465.[25]

By definition, a guilty plea entails the waiver of several important constitutional rights and privileges. *Boykin v. Alabama*, 395 U.S. at 243; *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Thus, in *Boykin*, this Court stressed the significance of a guilty plea even when the defendant is represented. Noting that the defendant in *Boykin* (like respondent here) was pleading guilty to capital murder, this Court insisted on "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the [guilty] plea connotes and of its consequence." 395 U.S. at 244.[26] *See also Carnley v.*

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[25] As this Court stated in *Zerbst*:

> The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

304 U.S. at 465. This passage illustrates the irrelevance of the United States' point that, until this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), denial of the right to counsel violated due process only if "special circumstances" obtained which required counsel to ensure fairness. Brief of United States as *Amicus Curiae* at 21. To the contrary, this Court took a more expansive view of due process even in the pre-*Gideon* era. For example, in *Massey v. Moore*, 348 U.S. at 108, this Court noted: "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."

[26] *Boykin*'s "utmost solicitude" is, of course, in keeping with this (continued...)

Cochran, 369 U.S. at 513 (trial court has affirmative duty to see that waiver of counsel is made "intelligently and understandingly").

Where the defendant is unrepresented, as respondent was in this case, the knowing and intelligent standard articulated in *Zerbst* must also incorporate a judgment about the defendant's mental competency if it is to make any sense. *See, e.g., Chapman v. United States*, 553 F.2d at 892 n.10. Indeed, the United States makes precisely this point in its brief supporting petitioner in this case. Brief of United States at 12 ("The determination that a defendant understands the nature and consequences of waiving his rights necessarily implies that he is competent to do so"); *see also* Brief of Criminal Justice Legal Foundation as *Amicus Curiae* at 20. As a threshold matter, therefore, there is general agreement that the notion of a "knowing and intelligent waiver" of rights, and the notion of the defendant's competency, are inextricably related.

We disagree, however, with petitioner and his *amici*, about the nature of that relationship. According to the United States, the trial court's determination that Moran appreciated the consequences of his guilty pleas was functionally indistinguishable from a determination of his competency to plead guilty. Thus, the trial court's failure to make the latter finding specifically and on the record is not significant. In fact, it is a critical failing because it illuminates the trial court's failure to appreciate

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[26] (...continued)
Court's longstanding recognition that "death is different," and that an "especial concern" with due process in capital cases "is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

the contextual nature of the competency inquiry.[27] Thus, the court's reference at the plea hearing to earlier evaluations of Moran's competency to stand trial only highlights the due process problem. It clearly does not solve it.

II. AN INITIAL DETERMINATION OF COMPETENCY TO STAND TRIAL WITH COUNSEL DOES NOT NECESSARILY SUFFICE TO ASSURE THE TRIAL COURT OF THE DEFENDANT'S CONTINUING COMPETENCY TO DISCHARGE COUNSEL, PLEAD GUILTY AND SUSPEND HIS OWN DEFENSE IN A CAPITAL CASE

The trial court's duty to investigate Moran's competency when he moved to discharge counsel and plead guilty was not and could not have been discharged by the court's reliance upon earlier psychiatric determinations that Moran was competent to stand trial. Nor was the trial court's derogation of its duty to make a specific inquiry into Moran's competency cured by a subsequent evidentiary hearing that cited to those initial psychiatric evaluations.[28] Respondent's decision to discharge counsel and plead guilty occurred well after the psychiatric evaluations ordered by the trial judge had been completed. And, critically, the psychiatrists who performed those evaluations were never asked to determine Moran's competency to enter a guilty plea and to proceed without

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[27] Moreover, the validity of a defendant's proposed waiver of constitutional rights is not a question to be mechanically assessed according to a rote formula. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. at 464.

[28] Pet.App. D.

counsel.

In *Drope*, this Court found that the trial court had wrongly relied on the report of a psychiatrist who had not been asked to address "medical facts bearing specifically on the issue of petitioner's competency to stand trial, as distinguished from his mental and emotional condition generally." 420 U.S. at 176. Here, similarly, the state trial and appellate courts looked to psychiatric evaluations that addressed Moran's competency to stand trial during the period when he intended to present a defense with the assistance of counsel after entering pleas of not guilty. Such a psychiatric foundation is inadequate to support the courts' conclusion that Moran later was competent when he discharged his attorneys and proffered his guilty pleas.

As one commentator has noted, competency to waive counsel and proceed *pro se* is "by all accounts a separate construct" from competency to assist counsel in the presentation of a defense.[29] This is the only approach consonant with the premise, recognized by this Court in *McMann v. Richardson*, 397 U.S. 759, 768-71 (1970), that in many instances an attorney's competent advice precludes a defendant's subsequent attack on his guilty plea, which would be vulnerable to challenge as "involuntary" absent the assistance of counsel.

The notion that competency to assist in one's defense by counsel, and competency to waive one's defense without counsel, are not coterminous concepts, is hardly

[29] "[C]ourts have uniformly concluded, in the wake of *Faretta*, that [the right of self-representation] prevails *only* if the defendant satisfies a more demanding test of decisional competence than would otherwise be required for adjudication with counsel." Bonnie, "The Competence of Criminal Defendants: A Theoretical Reformulation," 10 Behav. Sci. & the Law 291, 299-300 & n.40 (1992)(citing cases).

new to this Court.[30] "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Massey v. Moore*, 348 U.S. at 108. Based on this understanding, the *Massey* Court read the contemporary due process requirement of a fair trial to mean that a defendant competent to stand trial with the assistance of counsel could nonetheless be incompetent to present his own defense not due to lack of legal skill or sophistication, but due to insanity or other mental impairment. "Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows . . . . Yet problems difficult for him are impossible for the insane. Any defense is hopelessly beyond reach for an accused who is insane." *Id.* at 108-09.

Despite the United States' efforts to narrow its holding, Brief of United States at 20-21, the import of *Massey* could not be clearer. *Massey*'s rule is that the trial court must ascertain whether a defendant is competent to represent himself without counsel. Further, while such a determination may occur at the same time as the judgment regarding the accused's competency to stand trial, it is a distinct obligation of the trial court that must be consciously discharged before a defendant may be allowed to proceed uncounseled. Indeed, the *Massey* Court ordered a new hearing on the defendant's compe-

[30] Nor is it controversial from a clinical perspective. *See, e.g.*, Roesch & Golding, COMPETENCY TO STAND TRIAL 10-13 (1980); American Bar Association Criminal Justice Mental Health Standards, Standard 7-4.1 Commentary at 175 ("Competence is functional in nature, context-dependent and pragmatic in orientation"). *See also* Bonnie, *supra* n.27, at 292.

The requirement that competency be determined contextually is a long established canon of mental health jurisprudence outside the criminal context as well. *See generally* Winick, "Competency to Consent to Treatment: The Distinction Between Assent and Objection," 28 Hous.L.Rev. 15 (1991).

tency to proceed without counsel because the lower courts had never separated the two inquiries, merely finding an all-purpose competency. "That may mean that the evidence to support the finding that petitioner was competent to stand trial with a lawyer was also sufficient to sustain the conclusion that he was competent to stand trial without a lawyer. It may mean that in the view of the district court the two issues are the same [an incorrect legal conclusion, in this Court's view]. The present record leaves us in doubt." *Id.* at 108.

In *Westbrook v. Arizona*, 384 U.S. 150, the Court reiterated the distinction between competency to stand trial with counsel, and competency to proceed uncounseled. "Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." *Id.* If the latter is in doubt, it must be determined in a discrete inquiry before the trial court may accept a waiver of the right to counsel.[31] Lower courts have consistently read *Westbrook* for that straightforward proposition.[32]

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[31] The argument that, "at most," *Westbrook* requires a separate inquiry into a defendant's competency to waive counsel only when he intends to conduct a defense, rather than to plead guilty, is misplaced. Brief of United States at 16 ("a defendant's choice to forgo counsel's advice does not necessarily entail his active self-representation during trial. [Here, Moran] did not intend to represent himself at trial, but intended to plead guilty"); *id.* at 22-23 n.6, *citing Splitt v. United States*, 364 F.2d 594, 598 (6th Cir. 1966), *cert. denied*, 385 U.S. 1019 (1967). An accused's choice to plead guilty rather than proceed to trial is as much an act of legal self-representation as the conduct of a trial, and the consequences are perhaps more definitive. Thus, the ability to make the decision rationally is as crucial, if not more so, than the ability to rationally undertake the conduct of a trial on one's own behalf.

[32] *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 754 (2d Cir. (continued...)

This Court in *Drope* underscored the principle that judgments about competency are necessarily contextual. "[A] defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." 420 U.S. at 176. That observation applies with particular force here. The acknowledged standard for determining competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . ." *Dusky v. United States*, 362 U.S. at 402. As the Ninth Circuit recognized, however, the decision to waive counsel and to conduct an uncounseled defense (or to waive a defense by an uncounseled guilty plea) raises different issues of competency.[33] "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. at 466. *See also Matusiak v. Kelly*, 786 F.2d 536, 543 (2d Cir. 1986).

It is that "distinct" question that was never addressed

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[32] (...continued)
1975); *Government of Virgin Islands v. Niles*, 295 F.Supp. 266 (D.V.I. 1969). "[*Westbrook v. Arizona*] holds unequivocally, that an adjudication by the trial court that an accused is capable of going to trial and aiding his counsel, is not a determination of his competency to act as his own counsel. When the accused demands his constitutional right to act as his own counsel, the trial court is faced with the necessity of making a factual determination of the competency of the accused to: (1) intelligently waive the services of counsel, and (2) act as his own counsel." *State v. Kolocotronis*, 436 P.2d 774, 781 (Wash.Sup.Ct. 1968). *See also* Silten & Tullis, "Mental Competency in Criminal Proceedings," 28 Hastings L.J. 1053, 1065-72 (1977).

[33] In light of the ample support in this Court's prior cases for the Ninth Circuit's contextualized approach to competency, there can be no justification for the United States' suggestion that the court below introduced a "new category of competence." Brief of United States at 20.

by the state courts in this case. Moreover, in the absence of a focused inquiry, it is uncertain on this record whether Moran "possesse[d] an understanding of the law in relation to the facts." His colloquy with the trial court at the plea hearing strongly suggests that he may not have appreciated the legal significance of his statement that he did "not really" act with premeditation or malice. *See* p.5, *supra*. The evaluation by Dr. O'Gorman leaves some doubt whether Moran was capable of forming the requisite intent for capital murder.[34] Finally, it is entirely unclear, because no one ever asked, whether Moran was emotionally competent (as opposed to cognitively able) to weigh the legal options available to him at the plea hearing. As set forth more fully below, this ambiguity demanded further inquiry, especially when respondent's life was at stake.

III. THE TRIAL COURT HAD A CONTINUING OBLIGATION TO DETERMINE RESPONDENT'S COMPETENCY IN LIGHT OF CHANGED CIRCUMSTANCES AND THE EVOLVING POSTURE OF THE PROCEEDINGS

"Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S at 181. Contrary to the view expressed by the United States, Brief of United States at 9, 11-12, the trial court wrongly separated its inquiries into Moran's mental competency, and

[34] "[A]t the actual time, if he were under the influence of large amounts of cocaine, particularly free-base or crack, I don't think he could form intent at that moment. My experience with cocaine is that it's very devastating, that those who are indulgent in this do not question motivation, their own motivation at all . . . ." J.A.74-75.

the intelligence of his attempted waiver of constitutional rights. The court was obliged to do more than judge whether Moran's guilty pleas and waiver of counsel were undertaken with a cognitive awareness of the grave consequences of his decisions. In the context of Moran's desire to eliminate his defense altogether, and the fact of his medication, the Nevada courts were additionally required to determine Moran's specific competency at the juncture where he applied to waive his fundamental constitutional rights. *Drope v. Missouri*, 420 U.S. 162.[35]

The trial court evidently satisfied itself that Moran knew the likely consequences of waiving counsel, pleading guilty and refraining from placing any mitigating evidence before the sentencing panel.[36] Adopting that finding *arguendo*, Moran's very awareness of the probable consequences should have raised renewed questions in the mind of the court about Moran's *competency* to make any and all decisions pertinent to his defense. The crucial question which went unasked in the trial court was whether Moran was emotionally and mentally capable of rationally weighing the consequences of his decisions to discharge his attorneys and to plead guilty. In answering that question, the trial court could have and should have requested a new psychiatric evaluation focused on Moran's competency to proceed *pro se* and plead guilty to capital murder.

This Court decided in *Faretta v. California*, 422 U.S. 806 (1975), that a criminal defendant has a constitutional right to represent himself without counsel, so long as the

[35] *See also Pate v. Robinson*, 383 U.S. 375 (1966)(court's failure to order competency hearing denied due process); *Suggs v. LaVallee*, 570 F. 2d 1092, 1117 (2d Cir. 1978)("Because of the peculiar facts of this case, the sentencing court was obligated to inquire into Suggs' competency at plea to determine the necessity of conducting a second *Boykin* colloquy").

[36] *E.g.*, J.A.46-54.

record shows that "'he knows what he is doing and his choice is made with his eyes open.'" *Id.* at 835, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). The right vindicated in *Faretta*, however, was the defendant's right to present the defense of his choice, "to defend himself if he truly wants to do so," 422 U.S. at 817, not the right to surrender any pretense of defense by ensuring that no advocate is present who might frustrate the defendant's desire to submit to an inappropriate conviction or punishment.[37]

The United States makes the point that "[r]espondent's willingness to accept the punishment of death was not . . . definitive evidence of his incompetence or mental disability." Brief of United States at 27. We agree. However, for the decision below to be sustained, it is not necessary that Moran's incompetency be *definitively* evi-

[37] Faretta did not want to be represented by a public defender because "he believed that that office was 'very loaded down with . . . a heavy case load.'" 422 U.S. at 807. As this Court noted in *Adams v. United States ex rel. McCann*:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . . . What were contrived as protections for the accused should not be turned into fetters . . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards be treating them as empty verbalisms.

317 U.S. at 279-80, *quoted with approval*, *Faretta v. California*, 422 U.S. at 815. Unquestionably the *Faretta* Court saw the right of self-representation as tied to the rational desire of an accused individual to put on the best available defense. "[I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense . . . It is the defendant, therefore, who must be free personally to decide *whether in his particular case counsel is to his advantage*." 422 U.S. at 834 (emphasis added).

denced by his fatalistic or nihilistic behavior as it appears in the record. Rather, it is enough that Moran's actions, coming from a defendant whose initial competency to stand trial could not be taken for granted, should have called into question his continuing competency to participate in his own defense in any capacity. Under the due process clause, that doubt as to Moran's desire for self-preservation required a new competency hearing.

The fact that Moran was taking several medications at the time that he submitted his guilty pleas and discharged counsel should also have led the trial court to initiate an inquiry into his competency at that point in time. Yet, the court did not even bother to ascertain the nature or number of the drugs Moran was taking, let alone their possible effect on his bearing or mental condition.[38] Petitioner and his *amici* point to the fact that the prosecutor and the trial judge felt that Moran's behavior was unaffected by the medications, *e.g.*, Brief of United States at 27, Brief of Criminal Justice Legal Foundation at 8. Such opinions are of negligible weight in deciding whether a competency hearing is called for. As this Court observed in *Pate v. Robinson*, the opinion of court personnel that the defendant behaved as a competent person would behave, arrived at without independent evaluations or a hearing, cannot suffice to override other reasons to suspect that he might be acting irrationally. "While [the accused's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." 383 U.S. at 386. *Cf. Bishop v. United States*, 350 U.S. 961 (1956). In any event, it is difficult to understand how an opinion uninformed by such essential information as the names and characteristics of the drugs involved can suffice as a "finding" regarding competency.

[38] J.A.33.

The question of whether the Ninth Circuit substituted its factual conclusions as to Moran's competency for the state courts' judgment is a red herring.[39] As the Ninth Circuit recognized, the state courts never exercised the judgment that was constitutionally required because they never specifically inquired into Moran's competency to discharge his counsel and to plead guilty. Whether a federal court engaged in collateral review can determine on the record Moran's *actual* competency at the time is not the central question presented here. If the answer to that question is no, as petitioner and his *amici* suggest, this Court may direct that the case be remanded to the Nevada courts to see if a specific determination of Moran's competency at the time he discharged counsel may now be made. But such an outcome would not disturb the legal holding of the Ninth Circuit that the trial court failed to make such a determination, as due process requires, and that the subsequent state court evidentiary hearing did not cure that failure because it, too, failed to examine *specifically* Moran's competency at the juncture where he moved to discharge counsel and to enter his guilty pleas.

In any event, the propriety of the remedy ordered by the circuit court is demonstrated by this Court's holdings in *Pate v. Robinson*, 383 U.S. 375 (in view of difficulty of retrospectively determining the issue of an accused's competency to stand trial after six years had elapsed since trial, remand for a new hearing on competency could not suffice, and a new trial was ordered or defendant was to be discharged), and in *Drope v. Missouri*, 420 U.S. 162 (where trial court failed to conduct competency hearing, due process would not be protected by remanding the case for a new hearing as to whether defendant had actually been competent six years earlier).[40]

[39] The question is raised in the principal brief for petitioner, Pet.Br. at 46-49, and at greater length in the brief *amicus curiae* of the Criminal Justice Legal Foundation at 5-18.

IV. THE REQUIREMENT THAT TRIAL COURTS SPECIFICALLY DETERMINE A DEFENDANT'S COMPETENCY IN THE CONTEXT OF EVOLVING CIRCUMSTANCES DOES NOT NECESSARILY MEAN THAT THERE IS A HIGHER STANDARD OF COMPETENCY FOR WAIVING CONSTITUTIONAL RIGHTS THAN FOR STANDING TRIAL

The language of the Ninth Circuit opinion, and of the question presented in the petition for *certiorari*, has somewhat obscured the critical legal issue actually raised by this case.[41] It is not that due process necessarily requires a *higher* standard of competency to waive certain rights than to stand trial with counsel's assistance. Rather, due process requires that courts *specifically* determine competency in both contexts. That one standard is not necessarily "higher" than the other is manifest when one considers a case in which a defendant who would not be competent to assist counsel in the conduct of his defense, might be competent to tender a guilty plea:

> [A] defendant's auditory hallucinations and attentional deficits make it impossible for him to sustain his attention in a courtroom

[40] *See also McCarthy v. United States*, 394 U.S. 459 (refusing to remand the case for a hearing on whether the defendant's plea had been intelligent and voluntary; rather finding on the record that it had not been, and ordering that the defendant be given an opportunity to plead anew); *Dusky v. United States*, 362 U.S. 402 (emphasizing the difficulty of retrospectively determining competency).

[41] *Cf. Helvering v. Gowran*, 302 U.S. 238, 245 (1937)("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason").

> for more than a few minutes . . . [However], his understanding of the charges and the criminal process are unimpaired, he is able to provide pertinent information to his attorney regarding the evidence in the case, and he is able to understand the relevant considerations in deciding whether to accept a proffered plea agreement. In this case, it might be said that the defendant is competent to plead guilty even though he may not be able to stand trial.[42]

Competency, then, is a contextualized notion, and competency for one purpose may not justify an inference of competency for another. That may or may not imply more than one hearing on competency in the course of a single criminal prosecution. In this particular case, however, the separation in time between the initial determination of competency to stand trial, and respondent's subsequent decision to waive counsel and plead guilty, the medications prescribed for respondent, and the differing demands on a defendant who assists counsel in his own defense and one who decides without counsel whether to present any defense, all required a second look at the question of competency. Because that "second look" never took place, respondent's conviction cannot stand.

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[42] Bonnie, *supra n.27,* at 293-94. A nuanced definition of competency has the additional value of allowing adjudication to go forward where a defendant is competent to assist counsel, but would fail a unitary competency test which included the need for "decisional competence" of the sort required to waive counsel and conduct (or forego) one's own defense. Id. at 299.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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